Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Accelerating Wireless Broadband	)	WT Docket No. 17-79
Deployment by Removing Barriers to	)	
Infrastructure Investment	)	

COMMENTS OF THE SEMINOLE TRIBE OF FLORIDA

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I. INTRODUCTION AND SUMMARY

The Seminole Tribe of Florida (Tribe) respectfully submits these comments in response to the Federal Communications Commission's (FCC) Draft Second Report and Order for *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Docket No. 17-79.[1] The Tribe strongly opposes the Draft Second Report and Order and urges the FCC not to move forward with its adoption. The Draft Second Report and Order poses significant threats to tribal historic properties, including sacred sites, in violation of Federal law. The Tribe recommends that instead of adopting the Draft Second Report and Order, the FCC facilitate meetings between industry and tribes to work out any conflicts that may be occurring in the way that industry and tribes voluntarily work together to assist the FCC in fulfilling its legal obligations to conduct historic preservation review.

The Tribe strenuously objects to the Draft Second Report and Order's removal of small wireless infrastructure from review under the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA). The FCC lacks authority to construct such an exclusion, its proposed regulatory change is arbitrary and capricious, and the exclusion of small wireless infrastructure from review is not in the public interest. Additionally, the Tribe opposes several of the Draft Second Report and Order's changes to existing processes for conducting NHPA and NEPA review. In particular, the Tribe has serious concerns with shortening the timeframe for tribal review and the guidance on tribal fees and contracting with non-tribal entities to perform Section 106 consulting work.

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[1] Please note that the Tribe previously submitted comments in response to the Notice of Proposed Rulemaking in this matter. See Comments of the Seminole Tribe of Florida, *In the Matter of Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Dkt. No. 17-79 (June 15, 2017).

The Seminole Tribe of Florida is a sovereign Indian tribe that has been federally recognized by the United States. The Tribe's reservations are located in the State of Florida, where the Tribe remains after resisting a brutal removal campaign by the Federal government. The Tribe's historic and sacred sites are located both on and off reservation. The United States has a trust obligation to protect these historic properties. This obligation extends across all branches and agencies of the Federal government, including the FCC.

To date, tribes across the country, including the Seminole Tribe of Florida, have participated in the Tower Construction Notification System (TCNS), which has efficiently facilitated tribal review of proposed wireless infrastructure deployment. This has avoided the need for tribes to invoke direct tribal consultation with the FCC on each cell tower, assisting the FCC in carrying out its responsibilities under Section 106 of the NHPA. As currently written, the Draft Second Report and Order will upend the voluntary industry–tribal cooperation that has made the TCNS a model for fulfilling Section 106 review. The Tribe urges the FCC to take seriously tribal objections to the policies contained in the draft and to engage with tribes in a meaningful way to streamline wireless infrastructure deployment while upholding Federal law and the Federal trust responsibility.

II. DISCUSSION

A. The Tribe Opposes Excluding Small Wireless Facilities from NHPA and NEPA Review

The Tribe strongly opposes the Draft Second Report and Order's exclusion of small cell wireless facilities from NHPA and NEPA review.[2] This exclusion exceeds the FCC's statutory authority, is arbitrary and capricious, and is contrary to the public interest.

[2] Although these comments primarily focus on the Tribe's interests in historic preservation review, the Tribe also has serious concerns about the FCC's intention to exempt small cell facilities from NEPA

1. Wireless Infrastructure Deployment is a Federal Undertaking

As the Tribe has previously commented, the deployment of wireless infrastructure is a Federal undertaking. The NHPA defines an "undertaking" to include a project, activity, or program "carried out by or on behalf of the Federal agency" or "requiring a Federal permit, license, or approval." 54 U.S.C. § 300320(3). Construction of wireless infrastructure, even small wireless infrastructure, is subject to Federal approval and licensing and transmits Federal spectrum. Thus, small wireless infrastructure is a Federal undertaking. The FCC must retain approval authority over small wireless facility construction.

The Draft Second Report and Order concludes that geographic area licenses provide insufficient Federal involvement to constitute an undertaking.[3] The FCC bases this conclusion, in part, on the fact that the license does not need to be obtained before wireless facility deployment.[4] However, the fact that wireless infrastructure can be deployed prior to FCC review in the licensing process is precisely why the FCC amended its rules in 1990 to require NHPA and NEPA review prior to construction. The FCC sought to ensure that environmental and historic preservation issues were addressed "early enough in the licensing process to ensure that [the FCC] fully meets its obligations under Federal … laws."[5] The FCC acknowledged its responsibility "to consider potential harm … before it occurs, not simply to await … damage and then attempt to rectify it."[6] The Advisory Council on Historic Preservation (ACHP) supported

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review. The Tribe notes that failure to assess environmental harm often has significant adverse impacts on tribes, tribal resources, and tribal culture.

[3] *Accelerating Wireless Broadband Deployment by Removing Barriers to Infrastructure Investment*, WT Dkt. No. 17-79, Draft Second Report and Order, at para. 81 (2018) [hereinafter "Draft Second Report and Order"].

[4] *Id.* at para. 80.

[5] *Amendment of Environmental Rules*, First Report and Order, GEN. Dkt. No. 88-387, at para. 9 (1990).

[6] *Id.* at para. 10.

the FCC's 1990 amendments, stating that they would "help resolve a major problem in the Commission's compliance with Section 106."[7]

In addition to arguing licensing occurs too late to trigger a Federal undertaking, the Draft Second Report and Order simultaneously argues that the licensing occurs too early. It states that although the NHPA requires that agencies evaluate the effects of undertakings before they occur, providers deploy wireless facilities well after the FCC has issued licenses.[8] Delay between licensing and construction does not change the fact that Federal licensing and transmission of Federal spectrum occur, causing wireless facility deployment to fall within the NHPA's definition of an undertaking.

Excluding small wireless facilities from NHPA and NEPA review will not speed wireless deployment. Rather, it will embroil industry and the FCC in protracted litigation, causing delay and increasing costs. No court has ruled that geographic area licenses are insufficient to trigger NHPA and NEPA. The D.C. Circuit specifically noted in *CTIA-Wireless Association v. FCC* that it was not addressing this issue.[9] Although the Draft Second Report and Order relies heavily on that case to argue that the FCC has the authority to exclude small wireless facilities from NHPA and NEPA review, that case merely *upheld* the FCC's own conclusion that wireless facilities constitute an undertaking.[10]

2. Excluding Small Wireless Facilities from Review is Arbitrary and Capricious

The Draft Second Report and Order concludes that small wireless facilities are "inherently unlikely to trigger environmental and historic preservation concerns."[11] However,

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[7] *Id.* at para. 5 (quoting the ACHP).
[8] Draft Second Report and Order, at para. 80.
[9] *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 113 n.3 (D.C. Cir. 2006).
[10] *Id.* at 112–115.
[11] Draft Second Report and Order, at para. 84.

only four years ago the FCC declined to adopt a categorical exclusion for small wireless infrastructure based on size alone.[12] The FCC stated "we find *no basis* to categorically hold that small wireless facilities such as DAS and small cells are not Commission undertakings."[13] The FCC rejected arguments that the size of the infrastructure provided "any characteristic of such deployments that logically removes them from the analysis applicable to other facilities" or that "deployments cease to be undertakings simply because of their size."[14] Rather, the FCC stated that "the ACHP's rules clearly contemplate that the determination of whether a proposed Federal action is an undertaking is separate from the determination of whether that action is the type that could have effect on historic properties. Thus, the extent of any potential effects is not relevant...."[15]

The FCC's abrupt reversal in the Draft Second Report and Order is arbitrary and capricious. The FCC does not provide sufficient basis for determining, based on size alone, that small wireless facilities will not adversely impact historic properties. The FCC states that several companies have commented that, thus far, they have had no or few instances where a tribe has objected to a small cell deployment.[16] It thus finds there is a "lower likelihood" of harm.[17] However, the Draft Second Report and Order admits that commenters have also stated that small wireless infrastructure projects have been found to have an adverse effect on historic properties, but it dismisses this information as either anecdotal or insufficient.[18]

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[12] *Acceleration of Broadband Deployment by Improving Wireless Facilities Siting Policies, et al.*, WT. Dkt. Nos. 13-238, 23-32, WC Dkt. No. 11-59, Report and Order, at para. 84 (2014).
[13] *Id.* (emphasis added).
[14] *Id.*
[15] *Id.*
[16] Draft Second Report and Order, at para. 74.
[17] *Id.* at para. 34.
[18] *Id.* at para. 73.

The Tribe is extremely concerned that deployment of small cell and Distributed Antenna System (DAS) facilities will severely adversely affect areas of great historic, religious, and cultural concern to the Tribe. Even small facilities, and the activity required to deploy them, can desecrate important sacred sites and mar other sites of cultural and religious importance. Additionally, the scale of the infrastructure deployment required to facilitate 5G technology is enormous. As the FCC notes, industry has stated that the deployment of small cell technology will require 10 to 100 times more antenna locations, with some companies planning to build tens of thousands of small cell sites in the next few years.[19] This massive deployment of infrastructure without environmental or historic preservation review is unconscionable. Tribal review is critical to determining whether adverse impacts will occur.

3. Excluding Small Wireless Infrastructure from Review is Contrary to the Public Interest

The Draft Second Report and Order concludes that clarifying that small wireless infrastructure is not subject to review under NHPA or NEPA is in the public interest. The FCC's public interest analysis stresses the cost of environmental and historic preservation review while stating that the benefits to be gained are "minimal."[20] This cost-benefit analysis is fundamentally dismissive of tribal interests in historic and cultural preservation and fails to uphold the United States' trust responsibility to tribes.

The potential harm to tribal historic properties is irreparable. Protection of tribal historic properties, including sacred sites, is critical to tribal cultural survival. Without Section 106 review, the massive deployment of small cell wireless infrastructure poses a grave threat to tribal interests that cannot be quantified in dollars. For the FCC to dismiss the value of tribal historic

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[19] *Id.* at para. 61.
[20] *Id.* at para. 58.

preservation review as marginal or minimal is deeply insulting to tribes and undermines the government-to-government relationship. The Tribe urges the FCC to reconsider its public interest analysis to take into account the invaluable historic, religious, and cultural resources that are at stake.

B. The Tribe Opposes Several Changes to the Review Process for Large Wireless Infrastructure

The Draft Second Report and Order would also significantly alter the process by which the FCC fulfills its Section 106 obligations regarding large wireless infrastructure. The Tribe opposes several of these changes, including the shortening of the time for tribal responses and issuing problematic FCC guidance regarding up-front fees and the hiring of non-tribal consultants.

1. Tribal Deadlines for Response Should Not Be Shortened

The Draft Second Report and Order shortens the overall time for tribal response from 60 to 45 days.[21] Currently, if a tribe does not respond to an applicant's notice within 30 days, the applicant is required to attempt a second contact. If a tribe does not respond within 10 days, the matter can be forwarded to the FCC, which then contacts the tribe in question and gives it 20 days to respond. The Draft Second Report and Order would eliminate the requirement that an applicant attempt a second contact and would allow only 15 days to respond after the FCC has followed up to contact a tribe.

The Tribe opposes this shortening of the timeframe for tribal response. The Tribe promptly responds to TCNS notices and is not interested in creating additional or unnecessary delay. However, Tribal Historic Preservation Offices (THPOs) operate with limited staff and

[21] *Id.* at para. 104.

budget, and a 60-day timeframe for determining whether a tribe is interested in participating in Section 106 review is reasonable.

2. Tribal Fees Are Reasonable and Appropriate

The Draft Second Report and Order would make significant changes to the way industry and tribes voluntarily cooperate to assist the FCC in fulfilling its Section 106 obligations. It would provide that industry need not pay tribal fees for initial assessments of proposed infrastructure deployments and that if a tribe insists on up-front fees it will be considered as failing to respond to an applicant's notification.[22] Significantly, tribal fees are already voluntary and are provided to compensate tribes for the staff time and resources a tribe expends conducting review of TCNS notifications. Additionally, the ACHP has acknowledged that tribal fees are entirely appropriate when a tribe is performing "a role similar to that of a consultant or contractor," stating that in such cases a tribe "would be justified in requesting payment for its services, just as is appropriate for any other contractor."[23]

The Draft Second Report and Order portrays tribal fees as being a significant and increasing burden for applicants. It cites extreme examples, such as one tribe charging as much as $1650.[24] To the extent certain tribes are charging unreasonable fees, the FCC can and should deal with these instances on a case-by-case basis. By and large, however, the payment of tribal fees are reasonable and tribes should be compensated for the work they perform to conduct historic preservation review.

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[22] *Id.* at para. 111.
[23] ACHP, *Consultation with Indian Tribes in the Section 106 Review Process: A Handbook*, at p. 13 (2012).
[24] Draft Second Report and Order, at para. 13.

The Seminole Tribe of Florida has consistent and reasonable Project Assessment fees.[25] The Tribe does not charge anything for assessing towers directly related to public health and safety or for emergency purposes. For traditional macro cell towers, the Tribe charges $500 per review and $200 for any reassessment needed due to changes in the original submission. For small cell or DAS facilities, the Tribe charges $300.

The Tribe's standard Project Assessment fees are justified by the significant level of effort and time required by the THPO to evaluate each project. The Draft Second Report and Order is incorrect in stating that up-front fees "do not compensate Tribal Nations for fulfilling specific requests for information and documentation" and are "more in the nature of a processing fee."[26] The assessment by the Tribe's THPO requires the assistance of three to four staff as well as the use of specific proprietary information developed by the THPO in consultation with the tribal community over many years. The fees charged support the THPO's ability to effectively manage review requests. The Tribe does not intend to fund its entire THPO through the Project Assessment fees, but it does reasonably expect that the fees will cover the costs of conducting Project Assessments.

Industry already pays tribes on a voluntary basis, and tribes participate in review through the TCNS on a voluntary basis rather than invoking direct Section 106 consultation with the FCC. The elimination of tribal fees for assessing projects will merely undermine the ability of THPOs to conduct reviews and slow the wireless deployment process. The Tribe objects to the Draft Second Report and Order's characterization of the nature of tribal fees and urges the FCC to reconsider its position.

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[25] *See* Seminole Tribe of Florida, Compliance Review Section: Federal Communications Commission Project Review Policy (rev. January 23, 2018), available at http://www.stofthpo.com/Compliance-Review-Seminole-Tribe-FL-Tribal-Historic-Preservation-Office.html.

[26] Draft Second Report and Order, at para. 111.

3. Tribal Input is Necessary to Conduct Tribal Historic Preservation Review

The Draft Second Report and Order provides that after the initial determination that historic properties are likely to be affected, an applicant may contract with a non-tribal entity when expert services are required, including identifying historic properties, assessing effects, or mitigation.[27] The Tribe is gravely concerned that this guidance will encourage industry to contract services to the lowest bidder rather than retaining the expertise of the impacted tribe.

The Seminole Tribe of Florida holds unique, and often sacred, knowledge regarding where its historic properties are located, the nature of those properties, and what is needed to protect them. Non-tribal consultants are not qualified to assess impacts to the Tribe's historic properties, nor are they qualified to design mitigation measures or monitor construction to ensure tribal historic properties are protected. Reasonable good-faith review of impacts to tribal historic properties cannot occur without the input of tribes. Further, proceeding with infrastructure deployment projects with mitigation measures that have not been approved by tribes, and with non-tribal monitors, poses a serious threat to tribal historic properties and will surely lead to lengthy and costly litigation.

Additionally, contracting out tribal historic preservation review to the lowest bidder will only stall the process as tribes feel the need to directly invoke tribal consultation. The NHPA imposes two distinct duties on the FCC. One is to take into account the effect of the undertaking on any historic property. Separately, the NHPA also provides that the FCC "*shall* consult with any Indian Tribe … that attaches religious and cultural significance" to tribal historic properties that might be affected by a Federal undertaking.[28] The consultation obligation is independent from the duty to evaluate impacts on tribal historic properties, and it may not be delegated to

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[27] *Id.* at 120.

[28] NHPA, Section 101(d)(6)(b); 54 U.S.C. § 302706.

industry applicants. Tribal consultation is part of the government-to-government relationship between the United States and tribal governments, and it is distinct from the expert advice tribes provide industry applicants as consultants or contractors. To the extent tribes are excluded from industry review and mitigation measures, tribes will be forced to avail themselves of direct FCC consultation.

C. The Tribe Requests Meaningful Consultation

The Tribe urges the FCC to engage in meaningful consultation with tribes to address how to streamline wireless infrastructure deployment while also upholding the agency's obligations under Federal law and its duty to carry out the Federal trust responsibility. The Draft Second Report and Order goes to great lengths to document the extent to which the FCC claims tribes have been consulted.[29] However, the FCC has failed to engage in meaningful government-to-government consultation.

The Tribe met with FCC staff on February 9, 2017, but this was prior to the issuance of the FCC's Notice of Proposed Rulemaking in this matter. Representatives of the Tribe have also attended a conference call on February 5, 2018 and attended a meeting in Albuquerque, New Mexico on February 21, 2018. Significantly, during both the February 2018 call and meeting, numerous tribes informed the FCC that government-to-government consultation involved more than an FCC-set agenda, a process that does not consider tribal comments part of the official record, and the attendance of FCC staff without decision-making authority. In both the call and the meeting, FCC staff represented that regardless of what the conversation was called, it could be useful for informational purposes. The unique government-to-government relationship between the United States and tribes requires more than informational, staff-level meetings.

[29] Draft Second Report and Order, at paras. 16–32.

The FCC's own policy statement acknowledges "the unique legal relationship that exists between the federal government and Indian Tribal governments, as reflected in the Constitution of the United States, treaties, federal statutes, Executive orders, and numerous court decisions."[30] In that policy statement, the FCC also "recognizes its own general trust relationship with, and responsibility to, federally-recognized Indian tribes" and commits itself to "endeavor to work with Indian Tribes on a government-to-government basis consistent with the principles of Tribal self-governance."[31] The Tribe urges the FCC to fulfill this commitment by meeting with tribal leaders on this matter of critical importance and by involving tribal governments in the process of determining how best to streamline wireless infrastructure deployment.

In addition, tribal representatives have repeatedly called for the FCC to facilitate meetings between tribes and industry to identify and address any problems that exist in the current process. Unfortunately, these calls for FCC-facilitated collaboration have not been granted. The Tribe recommends that the FCC honor these tribal requests.

III. CONCLUSION

The FCC's approach to streamlining wireless deployment in the Draft Second Report and Order gravely threatens tribal historic properties, including sacred sites, in violation of Federal law and the FCC's obligation to uphold the Federal trust responsibility. The Tribe urges the FCC not to adopt the Draft Second Report and Order and instead to partner with tribes to develop ways to facilitate the deployment of 5G technology while protecting invaluable tribal historic properties and respecting the government-to-government relationship.

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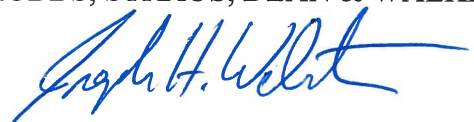
[30] *Statement of Policy on Establishing a Government-to-Government Relationship with Indian Tribes*, 16 FCC Rcd 4078, at *2 (2000).
[31] *Id.*

Sincerely,

HOBBS, STRAUS, DEAN & WALKER, LLP



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